

Memorandum 2016-37

**Relationship Between Mediation Confidentiality and Attorney Malpractice
and Other Misconduct: Possible Questions for the State Bar**

When the Commission met in June, questions came up regarding the availability of data from the State Bar that would be relevant to this study. The Commission considered the possibility of requesting that a State Bar representative attend and participate in its upcoming July meeting. Instead of making such a request, the Commission directed the staff to “prepare a memorandum on possible questions to ask a State Bar representative.”¹ This memorandum responds to that request.

The following materials are attached for convenient reference:

	<i>Exhibit p.</i>
• Letter from Ron Kelly to Saul Bercovitch (5/19/16)	1
• Letter from Saul Bercovitch to Ron Kelly (5/31/16)	3
• Letter from Saul Bercovitch to Ron Kelly (6/14/16)	4
• Email from Ron Kelly to Barbara Gaal (6/21/16)	37

Before discussing possible questions for a State Bar representative, it is important to recount the history of efforts to obtain relevant data from the State Bar.

PREVIOUS EFFORTS TO OBTAIN RELEVANT DATA FROM THE STATE BAR

In 2015, the staff prepared a memorandum on empirical data relevant to this study.² In preparing that memorandum, the staff sought information from the State Bar on the magnitude and nature of mediation misconduct in California (particularly attorney malpractice and other attorney misconduct).³

1. Draft Minutes (June 2016), p. 6.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See Memorandum 2015-5.

3. See *id.* at 37.

In response, Saul Bercovitch (Legislative Counsel, State Bar of California) reported that

the State Bar *has no empirical data* concerning the relationship between mediation confidentiality and 1) attorney malpractice or other misconduct that could form the basis of civil liability; or 2) attorney misconduct that could form the basis of State Bar disciplinary action. We do not have data on the number or frequency of complaints about attorney misconduct in California mediations, or a subset of California mediations, or the nature of any such complaints. When the State Bar receives a complaint about alleged attorney misconduct, there are certain allegations that are coded, but we do not have a code for allegations involving alleged misconduct in the course of a mediation.⁴

Soon afterwards, the Commission raised questions about how mediation communications are handled in a State Bar disciplinary proceeding:

- Does the State Bar exclude evidence or restrict discovery in its disciplinary proceedings due to the mediation confidentiality statutes?
- Does it instead decline to apply the mediation confidentiality statutes, because those statutes are inapplicable to a criminal case, and a State Bar proceeding is a quasi-criminal matter?
- Does the State Bar take some other position on this point?⁵

The staff passed those questions along to Mr. Bercovitch, who alerted the staff to the existence of a pending disciplinary proceeding that briefly addressed mediation confidentiality issues.⁶

In May of this year, mediator Ron Kelly sent a letter to Mr. Bercovitch respectfully requesting “access to the data existing in the State Bar’s database evidencing how many complaints found valid by a State Bar investigator in the past five years, 2011 through 2015, involved clients complaining about their lawyers’ misconduct during a mediation.”⁷ More specifically, Mr. Kelly asked the State Bar to:

- 1) perform a routine keyword search of the electronic records of all complaints found valid by a State Bar investigator in the past five years, 2011 through 2015, identifying those complaint files containing the word “mediation”,

4. *Id.* at Exhibit p. 1 (emphasis added).

5. Memorandum 2015-22, p. 47 (footnotes omitted).

6. See *id.* at pp. 47-48; see also First Supplement to Memorandum 2015-22, pp. 3-4.

7. Exhibit p. 1.

- 2) review those complaints to determine how many involved a client alleging misconduct by their lawyer during a mediation, and
- 3) either
 - a) provide the anonymized statistical information, or
 - b) provide copies of those files in which it was determined that reasonable cause existed to file discipline charges, redacted to eliminate any information which would violate privacy or confidentiality.⁸

Mr. Kelly further asked “whether there exists within the State Bar disciplinary system a written policy which prohibits receiving or recording information about allegations of lawyer misconduct in mediation.”⁹

The State Bar replied that “there does not exist within the State Bar disciplinary system a written policy that prohibits receiving or recording information about allegations of lawyer misconduct in mediation.”¹⁰ In a separate letter, the State Bar also provided a description of its disciplinary process, and then said that a search of NDCs (Notices of Disciplinary Charges) and stipulations in its disciplinary cases would not result in reliable data. It explained:

Based on your request for a search of electronic records of all “complaints found valid by a State Bar investigator,” this response is based upon NDCs and stipulations. As you note in your May 19 letter, California Law Revision Commission (CLRC) staff sought “reliable” data in connection with its Study K-402 to establish the frequency of lawyer misconduct in California mediations. We agree that this is a very important study, and are well aware of the significant amount of time and resources invested to date. We have, however, concluded that a search of NDCs and stipulations, even if feasible, would not result in reliable data.

NDCs are pled generally. We attach the NDC that was filed in *In re Bolanos*, Case No. 12-O-12167, along with the Opinion of the Review Department in that same case. This case was discussed in prior CLRC memoranda, prepared in connection with the current study. We know that it involved conduct during a mediation, and a mediation confidentiality issue, as discussed in the Opinion. Nevertheless, the NDC does not contain the word “mediation,” given the manner in which NDCs are pled. Based on this example alone, we believe a search of NDCs would not result in “reliable” data to establish the frequency of lawyer misconduct in California mediations. Although stipulations contain a statement of facts and

8. Exhibit p. 2.

9. *Id.*

10. Exhibit p. 3.

conclusions of law, the level of detail varies greatly, and they too are unlikely to result in reliable data.¹¹

The State Bar further advised that Mr. Kelly's requested search would be unduly burdensome:

You appear to assume the State Bar has an electronic database of complaints against lawyers and that a "routine keyword search" can be performed within that database. That is not the case. There are a number of obstacles to searching NDCs. NDCs are not all saved in a central database, folder, or file. We would need to individually locate each NDC. Moreover, NDCs are saved as scanned PDF files, which are final filed versions that include signatures. In order to do a word search of a scanned PDF, we would need to open each PDF, convert the document using optical character recognition, and then conduct a word search. Stipulations are also saved as scanned PDF files, so we would need to do the same in order to do a word search of stipulations. The State Bar's *Annual Discipline Report* for 2015 shows that, for 2012-2015, 3,096 NDCs were filed and 1,016 stipulations to facts and discipline were filed.¹²

The State Bar thus concluded that the burden imposed by Mr. Kelly's request "would clearly outweigh any benefit because ... the search would not result in reliable data in any event."¹³ It did, however, offer to make the NDCs and stipulations available for inspection and copying.¹⁴

POSSIBLE QUESTIONS FOR THE STATE BAR

After receiving the State Bar's response to his data request, Mr. Kelly sent us a letter in which he suggested two follow-up questions that the Commission could ask the State Bar:

1. What State Bar complaint records, if any, *do* exist in a form that can feasibly be searched for the keyword "mediation"?
2. If any such records do exist, what would it take for the State Bar to be willing to perform this search and use the results to identify any cases in which the word "mediation" appears and which did then proceed to a stage where a Notice of Disciplinary Charges or a stipulation of facts and discipline was created?¹⁵

11. Exhibit p. 5.

12. *Id.*

13. *Id.*

14. *Id.*

15. Exhibit p. 37 (emphasis in original).

Those are intriguing questions and worth considering. The staff is concerned, however, that any data obtained through such efforts *could seriously underestimate* the extent of mediation-related attorney misconduct.

In particular, because California’s mediation confidentiality statute seems to preclude use of mediation communications in a disciplinary proceeding, there may be little incentive for a mediation participant to report an attorney’s mediation-related misconduct to the State Bar. The effort might appear futile, because the mediation confidentiality statute would prevent proof of the misconduct. In addition, a mediation participant might have trepidations about reporting what occurred in a mediation, because that is supposed to “remain confidential.”¹⁶

Thus, as long as the mediation confidentiality statute stays as is, it may not make sense to devote much more effort to attempting to obtain data from the State Bar about the frequency of mediation-related disciplinary proceedings.

Comments on this point would be helpful.

In making this point, the staff considers it important to emphasize two related matters. First, the type of State Bar data Mr. Kelly requested is *not the only type of data* that might reflect on how often attorneys engage in mediation misconduct.

- On the one hand, for example, Memorandum 2015-5 describes a number of studies reporting high satisfaction rates for court-connected mediations in California.¹⁷ As noted in that memorandum, “[t]he popularity of California’s court-connected mediation programs and high levels of satisfaction with those programs tend to suggest that misconduct during such mediations is not frequent.”¹⁸
- On the other hand, no such data is available for private mediations. Moreover, various specific incidents of alleged mediation misconduct (in court-connected and private mediations) have come to the Commission’s attention in the course of this study. It is not clear how many of those allegations have merit, but commonsense suggests that at least some of them do.

The staff previously noted that the limited data available tends to suggest that mediation misconduct “is relatively infrequent, but allegations of such misconduct do occur occasionally and at least a few of those allegations appear

16. Evid. Code § 1119(c).

17. Memorandum 2015-5, pp. 32-36; see also Memorandum 2015-6.

18. Memorandum 2015-5, p. 36.

to have some merit.”¹⁹ **We would much appreciate input on whether there is any additional data that might bear on the validity of this conclusion.**

Second, in drafting its tentative recommendation in this study, the Commission should consider whether the proposed law should require the State Bar to collect certain data upon enactment of the new mediation confidentiality exception under discussion. For instance, the Commission could propose that upon the operative date of the proposed new exception, the State Bar must begin collecting data on instances of alleged mediation-related attorney misconduct and the fate of those allegations. The Commission could further propose that the State Bar must present that data (perhaps in anonymized format) by a particular date, for further evaluation by the Legislature or other entity.

Does the Commission have any interest in this concept? If so, then it will have to think carefully about the best way to implement it. **That might be a good topic to address with a State Bar representative.**

Commissioners and other interested persons should also consider whether it would be useful to seek the State Bar’s input on any other aspects of this study. **Suggestions about this would be helpful.**

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

19. Memorandum 2015-5, p. 47 (emphasis in original).

Re: Request for Information Relating to Allegations of Lawyer Misconduct in Mediation
California Law Revision Commission Study K-402
Via Email and Certified Mail

Dear Mr. Bercovitch,

I hereby respectfully request, under the common law right of public access cited in the Sander decision, access to the data existing in the State Bar's database evidencing how many complaints found valid by a State Bar investigator in the past five years, 2011 through 2015, involved clients complaining about their lawyers' misconduct during a mediation.

The California Supreme Court's 2013 decision in *Sander v. State Bar of California* states in relevant part "under the common law right of public access, [when] there is a sufficient public interest in the information contained in [its]...database...the State Bar is required to provide access to it if the information can be provided in a form that protects the privacy of [individuals] and no countervailing interest outweighs the public's interest in disclosure."

There is a sufficient public interest in the information for the following reasons.

1. In 2012, the Legislature directed the California Law Revision Commission to conduct its current Study K-402, and to determine if the public interest would be served by removing some of the current protections for confidentiality of mediation communications when there is an allegation of lawyer misconduct. Commission staff has sought – but has not been able to identify and obtain – reliable data to establish the frequency of lawyer misconduct in California mediations. Among other sources, Commission staff requested data last year from the State Bar. Staff was advised that "the State Bar has no empirical data concerning the relationship between mediation confidentiality and...attorney malpractice or other misconduct...[because] we do not have a code for allegations involving alleged misconduct in the course of a mediation."(CLRC Staff Memorandum 2015-5 page Ex 1)
2. In the course of this study the State has already invested very significant resources to enable Commission staff to research and prepare more than fifty in-depth memoranda, and to receive, study, and summarize many hundreds of public comments. Hundreds of interested and affected organizations and members of the public have already invested the time to read, analyze, and comment on various proposals. Many have taken extensive time away from work to appear at Commission meetings.
3. Those opposed to weakening our existing protections assert that over the past thirty years hundreds of thousands and probably millions of Californians have gained the benefits of our current predictable mediation confidentiality. They argue that the Commission's current proposal would remove that public benefit, mostly making it easier for just a few clients to sue their attorneys for alleged malpractice. Opposition statements have been submitted by the State of California's own Mediation and Conciliation Service, the California Judges Association, the California Dispute Resolution Council, the Southern California Mediation Association, the Association for Dispute Resolution of Northern California, the Contra Costa and Marin County Bar Associations, Community Boards of San Francisco, and by hundreds of individual mediators from all sectors of practice ranging from the immediate past president of JAMS to former family law bench officers. (Available in "Public Comments" memos at <<http://www.clrc.ca.gov/K402.html>>)
4. Commission staff particularly summarizes the opposition from the California Judges Association as follows - "CJA says that private mediation 'lessens the burdens of the terribly underfunded civil trial courtrooms, civil trial judges and staff by resolving cases with no economic cost to the court or the justice system'" and "CJA is convinced that mediation confidentiality is simply too valuable to the civil court system in our state as a matter of public (and effective) policy to sacrifice ..." (CLRC Staff Memorandum 2016-19, pages 2-3)
5. Preliminary sampling strongly suggests the problem does not occur frequently enough to justify the impacts of the proposed change. An informal email poll was sent to all State Bar investigators and

prosecutors in 2014 by the Office of the Chief Trial Counsel. Responses identified only four or five cases where our current mediation confidentiality protections had posed a significant problem for them during the previous year. A recent search for the keyword "mediation" of all published State Bar Court appellate level decisions for the period 11/19/2010 through 5/19/15 (in the Review Department Opinions published online) identified only four cases containing this term. These were Southwick 11-O-11334, Guzman 11-O-17734, Leonard 09-O-11175, and Weiss 09-O-10499. None of these referenced allegations of misconduct by lawyers in mediation. Law Revision Commission staff reviewed the results of a Judicial Council study of numerous court mediation programs around the state, and found the "result tends to suggest that there was little or no professional misconduct." (CLRC Staff Memorandum 2015-6 page 13)

6. Given the amount of time and resources already expended and yet to be expended by government staff and affected parties, and given the CJA's predictions of a significant increase in cost to the public court system if the Commission continues in its current direction and the Legislature adopts its recommendations, there is a sufficient public interest in obtaining any reliable evidence which would help establish the actual frequency of lawyer misconduct in California mediations.

The State Bar has the means to help establish whether there is in fact a need for the proposed change using its existing database of complaints against lawyers. Over the most recent five year period for which records are available, the State Bar reported that it received 68,646 complaints against lawyers (page 13, State Bar Annual Discipline Report dated April 30, 2015, and page 9, Report dated April 29, 2016). Unless these complaint records have been destroyed, or are kept only as handwritten notes, the data does exist in the State Bar's computer system evidencing how many complaints found valid by a State Bar investigator in this five year period involved clients complaining about their lawyers' mediation conduct.

I hereby respectfully request that the State Bar

- 1) perform a routine keyword search of the electronic records of all complaints found valid by a State Bar investigator in the past five years, 2011 through 2015, identifying those complaint files containing the word "mediation",
- 2) review those complaints to determine how many involved a client alleging misconduct by their lawyer during a mediation, and
- 3) either
 - a) provide the anonymized statistical information, or
 - b) provide copies of those files in which it was determined that reasonable cause existed to file discipline charges, redacted to eliminate any information which would violate privacy or confidentiality.

If a countervailing interest exists which clearly outweighs the public's interest in disclosure identified above, I respectfully request you clearly identify this interest.

I respectfully request that you advise me of whether there exists within the State Bar disciplinary system a written policy which prohibits receiving or recording information about allegations of lawyer misconduct in mediation. If so, I respectfully request you provide a copy of this policy, including the year it went into effect.

Thank you in advance for your courtesy and cooperation in this effort. I believe your timely response will greatly benefit the public interest.

Yours,
Ron Kelly
2731 Webster St.
Berkeley CA 94705

cc by email only:

Ms. Jayne Kim, Chief Trial Counsel, State Bar of California
Ms. Barbara S. Gaal, Chief Deputy Counsel, California Law Revision Commission
Hon. David W. Long (Ret.), Executive Board Member, California Judges Association
Ms. Heather S. Anderson, Supervising Attorney, Judicial Council of California
Mr. John S. Warnlof, President, California Dispute Resolution Council



THE STATE BAR
OF CALIFORNIA
180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA, 94105

May 31, 2016

Ron Kelly
2731 Webster Street
Berkeley, CA 94705

Via email: ronkelly@ronkelly.com

Re: Request for State Bar Records

Dear Mr. Kelly:

This letter is in response to your request dated May 19, 2016, addressed to me and received by the State Bar of California by email on that same date. You requested information "under the common law right of public access cited in the Sander decision." The State Bar is now subject to the California Public Records Act (Gov. Code, § 6250 et. seq) (CPRA). Our response will cover both the common law and the CPRA.

Your letter includes the following: "I respectfully request that you advise me of whether there exists within the State Bar disciplinary system a written policy which prohibits receiving or recording information about allegations of lawyer misconduct in mediation. If so, I respectfully request you provide a copy of this policy, including the year it went into effect." In response, we advise that there does not exist within the State Bar disciplinary system a written policy that prohibits receiving or recording information about allegations of lawyer misconduct in mediation.

The State Bar is in the process of reviewing the remainder of your request. With respect to the remainder, a 14-day extension until June 14, 2016 is needed, pursuant to Government Code sections 6253(c)(2)-(4).

Very truly yours,

A handwritten signature in blue ink that reads "Saul Bercovitch".

Saul Bercovitch
Legislative Counsel
The State Bar of California



THE STATE BAR
OF CALIFORNIA
180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA, 94105

June 14, 2016

Ron Kelly
2731 Webster Street
Berkeley, CA 94705

Via email: ronkelly@ronkelly.com

Re: Request for State Bar Records

Dear Mr. Kelly:

This is a supplemental response to your letter dated May 19, 2016, in which you requested that the State Bar:

- “1) perform a routine keyword search of the electronic records of all complaints found valid by a State Bar investigator in the past five years, 2011 through 2015, identifying those complaint files containing the word ‘mediation’,
- 2) review those complaints to determine how many involved a client alleging misconduct by their lawyer during a mediation, and
- 3) either
 - a) provide the anonymized statistical information, or
 - b) provide copies of those files in which it was determined that reasonable cause existed to file discipline charges, redacted to eliminate any information which would violate privacy or confidentiality.”

To avoid potential confusion about terminology, and the basis of our response, we first provide a brief overview of the State Bar Disciplinary process. The disciplinary process typically begins with receipt of a written complaint in the Intake Unit (Intake) of the State Bar’s Office of Chief Trial Counsel (OCTC). There are also State Bar-initiated inquiries, which are inquiries into possible misconduct of an attorney initiated by OCTC based on information other than a written complaint, probation referral, or action that must be reported by an attorney, such as inquiries arising from media reports or anonymous sources.

Intake receives and reviews complaints that allege ethical misconduct by an attorney or the unauthorized practice of law by a non-attorney. Intake conducts the initial review of a complaint and gathers information as necessary, in order to determine whether to close or forward the complaint for investigation. If a complaint sufficiently alleges violation of a rule or statute, Intake will forward it for investigation. If it does not, the complaint will be closed.

Investigations are conducted in order to determine whether to proceed with disciplinary proceedings. After a determination to proceed with disciplinary proceedings, the complaint

advances to the pre-filing stage. Before finalizing formal charges, OCTC evaluates the evidence gathered during the investigation and any subsequent information received. Where OCTC has determined there is sufficient evidence to file a Notice of Disciplinary Charges (NDC), OCTC will notify the respondent in writing of the right to request a confidential Early Neutral Evaluation Conference (ENE). Some cases are then resolved by entering into a stipulation, prior to the filing of an NDC. If the parties are unable to reach a resolution or the attorney does not respond to OCTC's written notice, OCTC will proceed to file an NDC where there is clear and convincing evidence of professional misconduct. The NDC is a public document, and contains the disciplinary charges. Stipulations are also public documents, except for stipulations for private approvals where an NDC has not been filed.

Based on your request for a search of electronic records of all "complaints found valid by a State Bar investigator," this response is based upon NDCs and stipulations. As you note in your May 19 letter, California Law Revision Commission (CLRC) staff has sought "reliable" data in connection with its current Study K-402 to establish the frequency of lawyer misconduct in California mediations. We agree that this is a very important study, and are well aware of the significant amount of time and resources invested to date. We have, however, concluded that a search of NDCs and stipulations, even if feasible, would not result in reliable data.

NDCs are pled generally. We attach the NDC that was filed in *In re Bolanos*, Case No. 12-O-12167, along with the Opinion of the Review Department in that same case. This case was discussed in prior CLRC memoranda, prepared in connection with the current study. We know that it involved conduct during a mediation, and a mediation confidentiality issue, as discussed in the Opinion. Nevertheless, the NDC does not contain the word "mediation," given the manner in which NDCs are pled. Based on this example alone, we believe a search of NDCs would not result in "reliable" data to establish the frequency of lawyer misconduct in California mediations. Although stipulations contain a statement of facts and conclusions of law, the level of detail varies greatly, and they too are unlikely to result in reliable data.

We also note that your May 19 letter misapprehends the extent of the burden imposed by any such search, even assuming a search of NDCs or stipulations would result in reliable data. You appear to assume the State Bar has an electronic database of complaints against lawyers and that a "routine keyword search" can be performed within that database. That is not the case. There are a number of obstacles to searching NDCs. NDCs are not all saved in a central database, folder, or file. We would need to individually locate each NDC. Moreover, NDCs are saved as scanned PDF files, which are the final filed versions that include signatures. In order to do a word search of a scanned PDF, we would need to open each PDF, convert the document using optical character recognition, and then conduct a word search. Stipulations are also saved as scanned PDF files, so we would need to do the same in order to do a word search of stipulations. The State Bar's *Annual Discipline Report* for 2015 shows that, for 2012-2015, 3,096 NDCs were filed and 1,016 stipulations to facts and discipline were filed.

In conclusion, the burden imposed by your request would clearly outweigh any benefit because, as discussed above, the search would not result in reliable data in any event. (*See* Gov. Code, §

Ron Kelly
June 14, 2016
Page 3

6255; *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 453-454 [when “marginal and speculative benefit” was weighed against the cost and burden of segregating material exempt from disclosure from nonexempt material, “the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record”].) We are, however, willing to make the NDCs and stipulations available for inspection and copying if you would like to review any or all of the public documents.

Please let us know if you would like to discuss this matter further.

Thank you.

Very truly yours,



Saul Bercovitch
Legislative Counsel
The State Bar of California

1 STATE BAR OF CALIFORNIA
2 OFFICE OF THE CHIEF TRIAL COUNSEL
3 JAYNE KIM, No. 174614
4 CHIEF TRIAL COUNSEL
5 JOSEPH CARLUCCI, No. 172309
6 DEPUTY CHIEF TRIAL COUNSEL
7 KEVIN B. TAYLOR, No. 151715
8 ACTING ASSISTANT CHIEF TRIAL COUNSEL
9 SHERRIE McLETCHE, No. 85447
10 SENIOR TRIAL COUNSEL
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12 DEPUTY TRIAL COUNSEL
13 180 Howard Street
14 San Francisco, California 94105-1639
15 Telephone: (415) 538-2452

PUBLIC MATTER

FILED

DEC 21 2012

STATE BAR COURT CLERK'S OFFICE
SAN FRANCISCO

STATE BAR COURT

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of:

Case Nos. 12-O-12167

ALDON L. BOLANOS,
No. 233915,

NOTICE OF DISCIPLINARY CHARGES

A Member of the State Bar

NOTICE - FAILURE TO RESPOND!

**IF YOU FAIL TO FILE A WRITTEN ANSWER TO THIS NOTICE
WITHIN 20 DAYS AFTER SERVICE, OR IF YOU FAIL TO APPEAR AT
THE STATE BAR COURT TRIAL:**

- (1) YOUR DEFAULT WILL BE ENTERED;**
- (2) YOUR STATUS WILL BE CHANGED TO INACTIVE AND YOU
WILL NOT BE PERMITTED TO PRACTICE LAW;**
- (3) YOU WILL NOT BE PERMITTED TO PARTICIPATE FURTHER IN
THESE PROCEEDINGS UNLESS YOU MAKE A TIMELY MOTION
AND THE DEFAULT IS SET ASIDE, AND;**
- (4) YOU SHALL BE SUBJECT TO ADDITIONAL DISCIPLINE.
SPECIFICALLY, IF YOU FAIL TO TIMELY MOVE TO SET ASIDE
OR VACATE YOUR DEFAULT, THIS COURT WILL ENTER AN
ORDER RECOMMENDING YOUR DISBARMENT WITHOUT
FURTHER HEARING OR PROCEEDING. SEE RULE 5.80 ET SEQ.,
RULES OF PROCEDURE OF THE STATE BAR OF CALIFORNIA.**

1 19. By failing to inform McCarthy that respondent received the settlement proceeds,
2 Respondent failed to notify a client promptly of the receipt of the client's funds.

3 COUNT THREE

4 Case No. 12-O-12167
5 Rules of Professional Conduct, rule 4-100(A)
6 [Failure to Maintain Client Funds in Trust Account]

7 20. Respondent wilfully violated Rules of Professional Conduct, rule 4-100(A), by failing
8 to maintain the balance of funds received for the benefit of a client and deposited in a bank
9 account labeled "Trust Account," "Client's Funds Account" or words of similar import, as
10 follows:

11 21. Count One is incorporated by reference as if fully set forth herein.

12 22. At all relevant times herein, respondent maintained an attorney client trust account at
13 Chase Bank, account number ending in XXXXXX6123¹ ("CTA.")

14 23. On or about December 14, 2011, respondent signed McCarthy's name on the
15 settlement check and deposited the check into his CTA. Respondent signed McCarthy's name to
16 the back of the check without her knowledge or permission.

17 24. Between on or about December 14, 2011 and on or about December 27, 2011,
18 respondent removed from his CTA a total of \$149,470.54 in attorney fees and costs.

19 25. At the time that respondent removed the \$149,470.54 from his CTA, he was aware
20 that he had agreed to receive attorney fees of \$87,695.04 and that McCarthy disputed his
21 entitlement to attorney fees in excess of \$87,695.04.

22 26. Respondent removed from the CTA \$61,775.50 in disputed funds.

23 27. By removing from the CTA \$61,775.50 in disputed funds, Respondent failed to
24 maintain the balance of funds received for the benefit of a client and deposited in a bank account
25 labeled "Trust Account," "Client's Funds Account" or words of similar import.

26 ///

27 ///

28 ¹ The first six digits of the bank accounts are omitted for privacy purposes. **EX 10**

1 39. Thereafter, respondent failed and refused to pay McCarthy the \$61,775.50 he owed
2 her in settlement funds.

3 40. By failing to pay McCarthy the \$61,775.50 he owed her in settlement funds,
4 Respondent, failed to pay promptly, as requested by a client, any funds in Respondent's
5 possession which the client is entitled to receive.

6 COUNT SIX

7 Case No. 12-O-12167
8 Rules of Professional Conduct, rule 3-700(D)(1)
[Failure to Release File]

9 41. Respondent wilfully violated Rules of Professional Conduct, rule 3-700(D)(1), by
10 failing to release promptly, upon termination of employment, to the client, at the request of the
11 client, all the client papers and property, as follows:

12 42. Count One and Count Two are incorporated by reference as if fully set forth herein.

13 43. On or about January 3, 2012, McCarthy terminated respondent and hired attorney
14 Bruce Glassner ("Glassner") to represent her regarding respondent's mishandling of McCarthy's
15 matter.

16 44. On or about January 3, 2012, McCarthy requested that respondent provide her with
17 her client file.

18 45. Between on or about January 17, 2012 and on or about March 22, 2012, Glassner
19 repeatedly requested that respondent return McCarthy's client file.

20 46. Although respondent received the requests, respondent failed and refused to return
21 McCarthy's original client file to her.

22 47. By failing to provide McCarthy or Glassner with McCarthy's client file, Respondent
23 failed to release promptly, upon termination of employment, to the client, at the request of the
24 client, all the client papers and property.

25 NOTICE - INACTIVE ENROLLMENT!

26 **YOU ARE HEREBY FURTHER NOTIFIED THAT IF THE STATE BAR**
27 **COURT FINDS, PURSUANT TO BUSINESS AND PROFESSIONS CODE**
28 **SECTION 6007(c), THAT YOUR CONDUCT POSES A SUBSTANTIAL**
THREAT OF HARM TO THE INTERESTS OF YOUR CLIENTS OR TO

EX 12

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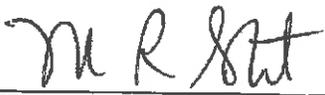
THE PUBLIC, YOU MAY BE INVOLUNTARILY ENROLLED AS AN INACTIVE MEMBER OF THE STATE BAR. YOUR INACTIVE ENROLLMENT WOULD BE IN ADDITION TO ANY DISCIPLINE RECOMMENDED BY THE COURT.

NOTICE - COST ASSESSMENT!

IN THE EVENT THESE PROCEDURES RESULT IN PUBLIC DISCIPLINE, YOU MAY BE SUBJECT TO THE PAYMENT OF COSTS INCURRED BY THE STATE BAR IN THE INVESTIGATION, HEARING AND REVIEW OF THIS MATTER PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION 6086.10.

Respectfully submitted,
THE STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL COUNSEL

DATED: December 21, 2012

By: 
TREVA R. STEWART
Deputy Trial Counsel

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DECLARATION OF SERVICE BY CERTIFIED AND REGULAR MAIL

**RE: ALDON L. BOLANOS
CASE NO.: 12-O-12167**

I, the undersigned, over the age of eighteen (18) years, whose business address and place of employment is the State Bar of California, 180 Howard Street, San Francisco, California 94105, declare that I am not a party to the within action; that I am readily familiar with the State Bar of California's practice for collection and processing of correspondence for mailing with the United States Postal Service; that in the ordinary course of the State Bar of California's practice, correspondence collected and processed by the State Bar of California would be deposited with the United States Postal Service that same day; that I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date on the envelope or package is more than one day after date of deposit for mailing contained in the affidavit; and that in accordance with the practice of the State Bar of California for collection and processing of mail, I deposited or placed for collection and mailing in the City and County of San Francisco, on the date shown below, a true copy of the within

NOTICE OF DISCIPLINARY CHARGES

in a sealed envelope placed for collection and mailing as *certified mail, return receipt requested*, and in an additional sealed envelope as *regular mail*, at San Francisco, on the date shown below, addressed to:

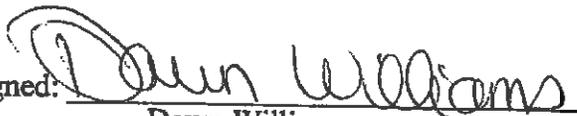
Article No. 7196 9008 9111 6623 1972:
Ronald Edward Mallen
Hinshaw & Culbertson, LLP
1 California St 18th Fl
San Francisco, CA 94111

in an inter-office mail facility regularly maintained by the State Bar of California addressed to:

N/A

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California, on the date shown below.

DATED: December 21, 2012

Signed: 
Dawn Williams
Declarant

Filed May 18, 2015

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT

In the Matter of) Case No. 12-O-12167
ALDON LOUIS BOLANOS,) OPINION
A Member of the State Bar, No. 233915)
_____)

The primary issue before us is whether Aldon Louis Bolanos’s improper handling of client monies constituted misappropriation involving moral turpitude or a fee dispute. After a three-day trial, the hearing judge dismissed the moral turpitude charge, characterizing the case as “a fee dispute that got out of control.” Giving great weight to the hearing judge’s factual findings, we agree.

Bolanos represented Victoria McCarthy and co-plaintiff Katherine Schmitt in their employment discrimination lawsuit against R. J. Reynolds Tobacco Company (Reynolds). The relationship between McCarthy and Bolanos deteriorated following her settlement on appeal with Reynolds. McCarthy filed a legal malpractice lawsuit against Bolanos and, ultimately, a State Bar complaint.

The hearing judge found that Bolanos committed misconduct when he: (1) represented clients with a potential conflict without their informed written consent; (2) failed to notify McCarthy promptly of the receipt of settlement funds; (3) improperly withdrew disputed funds from his client trust account (CTA); and (4) failed to promptly return McCarthy’s file at her request. Finding significant aggravation and significant mitigation, the hearing judge recommended discipline, including a 90-day actual suspension.

The Office of the Chief Trial Counsel of the State Bar (OCTC) appeals. It argues Bolanos is culpable of moral turpitude by intentional misappropriation, and renews its trial request that he be disbarred. Bolanos did not appeal, concedes his culpability as found by the hearing judge, and accepts the recommended discipline.

After independently reviewing the record under rule 9.12 of the California Rules of Court, we affirm the hearing judge's culpability findings. We also find that Bolanos's mishandling of client funds in ignorance of his fiduciary obligations constitutes a negligent misappropriation, as provided for in new standard 2.1(c).¹ Balancing the serious aggravation with the significant mitigation, we agree with the hearing judge that a one-year suspension, stayed, a 90-day actual suspension, and a one-year probation period is appropriate discipline under the standards and the applicable case law.

I. PROCEDURAL BACKGROUND

On December 21, 2012, OCTC filed a six-count Notice of Disciplinary Charges (NDC). The parties entered into a pretrial stipulation as to facts. At trial, OCTC offered the testimony of Bolanos and McCarthy. In his defense, Bolanos testified, presented seven character witnesses, and submitted the declarations of seven others.

¹ Former standard 2.2(a) addressed *any* misappropriation, and suggested the same presumptive discipline. Effective January 1, 2014, standard 2.1 replaced former standard 2.2(a), and now calls for differing levels of discipline depending on the type of wrongdoing that constituted the misappropriation, including: intentional or dishonest misconduct (std. 2.1(a) [disbarment]); grossly negligent misconduct (std. 2.1(b) [disbarment or actual suspension]); or misconduct that does not involve either intentional acts or gross negligence (std. 2.1(c) [suspension or reproof]). Further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

II. FACTUAL BACKGROUND²

The factual findings are largely undisputed and the hearing judge's 25-page decision provides a detailed summary of the factual issues. We adopt these findings, except where noted, and summarize and expand those relevant to our analysis.³

A. Fee Agreement

In April 2009, Bolanos began representing McCarthy and Schmitt in their employment dispute against Reynolds. An April 8, 2009 written fee agreement with McCarthy established that: (1) Bolanos would receive as his fees 25 percent of the proceeds from any settlement, judgment, or resolution of the Reynolds matter; (2) any statutory fees awarded would belong solely to Bolanos; and (3) McCarthy would reimburse Bolanos for costs. This was Bolanos's first case as a solo practitioner after working in various law firms since his admission.

While both Schmitt and McCarthy intended to sue Reynolds for discrimination, their hopes for the case differed. McCarthy was focused on moral vindication, and a monetary award was secondary; she was willing to go to trial. Schmitt wanted to settle and avoid trial. Bolanos admits he never advised McCarthy concerning any possible conflict of interest with Schmitt, nor did he obtain McCarthy's informed written consent to his representation of Schmitt.

B. Verdict Following Jury Trial

After a two-week trial in the summer of 2011, a United States District Court (Eastern District of California) jury found Reynolds liable on federal discrimination and retaliation

² This is Bolanos's first disciplinary proceeding since his admission to the Bar in 2004.

³ Rule 5.155(A) of the Rules of Procedure of the State Bar provides that the "findings of fact of the hearing judge are entitled to great weight." In particular, we accord great deference to findings based on credibility evaluations. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025,1032 [hearing judge "is best suited to resolving credibility questions, because [she] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand".])

claims.⁴ It awarded McCarthy and Schmitt each \$400,000 in compensatory and punitive damages. The district court judge reduced the damages as to each plaintiff to \$300,000 to conform to the statutory cap. The plaintiffs were also awarded a combined \$181,738 in attorney fees.

C. Fee Modification

Reynolds appealed to the U. S. Court of Appeals for the Ninth Circuit, which referred the case to mediation. Prior to mediation, Bolanos sought to increase his contingency fee from 25 percent to 33 percent for the additional work the appeal would require. He sent each plaintiff a new fee agreement, which Schmitt promptly signed. However, McCarthy did not sign because she was dissatisfied with Bolanos and was considering her options. Bolanos testified that McCarthy later agreed over the phone to a 30 percent contingency fee and signed a new agreement to that effect. The hearing judge, however, did not believe that McCarthy did so because Bolanos “was unable to produce any evidence of a new retainer.”⁵

Both plaintiffs were present at the mediation on December 1, 2011, and the case settled. McCarthy signed an agreement providing for a recovery of \$337,695.40, payable by one check to McCarthy and Bolanos, to be mailed to his office.

Bolanos admits he agreed to modify his fee agreement at the mediation so that McCarthy would receive \$250,000, rather than a percentage, from the settlement. McCarthy testified that

⁴ The plaintiffs also alleged state law claims of disability discrimination and tortious adverse employment actions. The district court judge granted Reynolds’s summary judgment motion on the disability claims, and the plaintiffs abandoned the remaining state law claims before submitting the case to the jury. This caused friction between Bolanos and McCarthy, who felt that Bolanos failed to properly advise her about the disadvantages of such action.

⁵ When Bolanos could not produce proof that McCarthy had agreed to a 30 percent contingency fee, he retracted this claim, and thereafter maintained he was owed a 25 percent contingency pursuant to the original fee agreement.

her willingness to settle was contingent on the modification. At all relevant times thereafter, Bolanos knew McCarthy believed she was entitled to \$250,000.⁶

The hearing judge found that, after the mediation, Bolanos “came to the conclusion that the modification was invalid because there was no consideration for the alteration of the April 8, 2009 fee agreement.” The judge also found he “believed that McCarthy’s claim of \$250,000 was unreasonable and invalid and that he was entitled to the disputed funds given his hard work.” Bolanos testified he thought the modification was not valid because \$250,000 was more than McCarthy would have received under the original contract if Reynolds had not appealed.⁷

D. Fee Dispute

On December 9, 2011, Bolanos received the \$337,695.40 settlement check, but did not tell McCarthy. The check was issued to both McCarthy and Bolanos. On December 14, he signed McCarthy’s name on the check without her knowledge and deposited it into his CTA. He testified that, as her attorney, he believed he was acting properly: “There was no intention on my part to try and forge or make her signature to appear to have been on the check. My sole purpose was to sign the check on behalf of myself and my client and put it in my trust account, because that’s what I thought I was supposed to do.” He admitted at trial that he had been mistaken and that his actions violated ethical rules.

Around December 23, Bolanos removed \$61,775.50 in disputed funds from his CTA. He testified that he believed at the time that he was entitled to 30 percent of the settlement as his

⁶ At trial, the hearing judge excluded all evidence concerning this modified fee agreement as being subject to mediation confidentiality. OCTC renews its trial argument that it was prejudiced because it could not submit evidence establishing that Bolanos agreed to reduce his fees. We reject this argument since most evidence about which OCTC complains became part of the record and proved that Bolanos agreed to the \$250,000 modification. Further, the hearing judge took into account that Bolanos agreed to reduce his fee, and Bolanos concedes the point on review. (See *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 241 [absent actual prejudice, party not entitled to relief on evidentiary ruling].)

⁷ In that scenario, McCarthy would have received \$225,000 less costs.

fees plus costs because McCarthy had agreed to this increase before mediation and the \$250,000 mediation agreement was unenforceable. However, he also candidly testified he was aware that McCarthy disputed the amount of his fees: "I knew that she would disagree with me, and I took the funds out of the trust account anyway I didn't know about [the rule requiring disputed funds to remain in his CTA], and I thought she was suing me for malpractice, and it was a mistake, and I'm aware of the rule now. I mean, it was a mistake."

On December 27, McCarthy emailed Bolanos asking if he had received the settlement check. The same day, Bolanos sent her a cashier's check for \$188,224.50 with a letter dated December 26, 2011, explaining his position and providing an accounting as follows:⁸

You will recall that previously you demanded that we deviate from the express provision in our attorney-client contract which provided for attorneys' fees equal to one-third of the judgment, decree, or settlement amount. However, such a demand is invalid as a matter of law because there is no mutual consideration for the alteration of the contract Therefore, enclosed please find settlement funds in the **full amount of the judgment**, less the contractual attorneys' fee and expenses incurred in prosecuting this case up to and through trial. The accounting breakdown is as follows:

Judgment Amount	\$300,000.00
Contractual Contingent Attorneys' Fee	(\$90,000.00)
Litigation Costs Incurred	(\$17,554.50)
Trial Costs Incurred	(\$3,776.00)
Post-Trial Costs Incurred	(\$445.00)

McCarthy received the check on December 28, and emailed Bolanos demanding the balance of the \$250,000, which was \$61,775.50 (\$250,000 - \$188,224.50). After a heated series of emails, McCarthy fired Bolanos on January 3, 2012, and hired malpractice counsel. She demanded a copy of her file and that the disputed funds be placed in a trust account. In response, Bolanos demanded that she pay \$5,000 into escrow to defray reproduction costs, promising to

⁸ The record does not indicate whether Bolanos sent the letter and check before or after he received the email from McCarthy. He did not send an email in response to hers.

return the unused portion, and refused to put the disputed funds into escrow unless she returned the settlement funds paid to her.

The parties were at a stalemate until March 6 when Bolanos offered to pay McCarthy \$70,000, which was \$8,224.50 more than she would have received under the \$250,000 settlement. She rejected the offer and filed suit alleging fraud and malpractice. Bolanos then returned her client file. The lawsuit was settled and McCarthy testified she was “made whole.”

III. CULPABILITY

Count 1: Failure to Obtain Informed Written Consent Regarding the Potential Conflict

Bolanos concedes he violated rule 3-310(C)(1) of the Rules of Professional Conduct⁹ by failing to advise McCarthy that she might want separate counsel from Schmitt’s given their differing goals and approaches to the Reynolds litigation. We find Bolanos culpable as charged for accepting dual representation of McCarthy and Schmitt, where their interests were in potential conflict, without obtaining their informed written consent.

Count 2: Failure to Promptly Notify Client of Receipt of Client Property

Bolanos concedes that he violated rule 4-100(B)(1)¹⁰ when he failed to promptly notify McCarthy that he had received the settlement check. He received it on December 9 but did not notify her until December 28, and his notice did not state the exact amount received. The three-week delay and incomplete notice constitutes a violation of the rule. (See *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033 [rule violation where attorney failed to notify client within three weeks of receipt of settlement funds and failed to specify exact amount received].)

⁹ Rule 3-310(C)(1) provides: “A member shall not, without the informed written consent of each client, accept representation of more than one client in a matter in which the interests of the clients potentially conflict.” All further references to rules are to this source.

¹⁰ Rule 4-100(B)(1) provides that a member shall “[p]romptly notify a client of the receipt of the client’s funds, securities, or other properties.”

Counts 3: Failure to Maintain Disputed Funds in Trust

Both at trial and on review, Bolanos conceded he violated rule 4-100(A)¹¹ by removing \$61,775.50 in disputed funds from his CTA. We find him culpable as charged. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar. Ct. Rptr. 335, 349 [disputed funds must be retained in trust account pending resolution of dispute].)

Count 4: No Misappropriation Involving Moral Turpitude

OCTC alleges Bolanos “knew that he had agreed to accept \$87,695.04 in attorney fees [\$337,695.04 - \$250,000] and that he paid himself \$61,775.50 in excess of his agreement.” Therefore, when he “took \$61,775.50 of funds he owed McCarthy and used them for his own use and benefit and not for the use and benefit of his client,” he committed misappropriation involving moral turpitude in violation of Business and Professions Code section 6106.¹²

The hearing judge dismissed this charge, finding that Bolanos’s removal of “trust funds based on a good faith but unreasonable belief of entitlement to such funds did not constitute misappropriation and did not violate section 6106.” OCTC insists Bolanos engaged in intentional fee grabbing, and that he acted dishonestly because he took the disputed funds knowing McCarthy had not given him permission. Neither party has argued that this case involved a grossly negligent misappropriation, and the hearing judge did not discuss it in the decision. For reasons detailed below, we affirm the hearing judge’s dismissal of Count 4.

First, the hearing judge “was in an appropriate position to assess the issues of [Bolanos’s] intent, state of mind, good faith, and reasonable beliefs and actions — all important issues bearing on whether moral turpitude was involved in this matter [Thus, we] are obligated to

¹¹ Rule 4-100(A)(2) provides: “when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.”

¹² Section 6106 provides, in part: “The commission of any act involving moral turpitude, dishonesty, or corruption . . . constitutes a cause for disbarment or suspension.”

give great weight to the hearing judge’s findings and conclusions on this subject.” (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 241.) Further, in challenging the credibility finding that Bolanos believed he had an honest claim to the disputed funds, OCTC “must demonstrate that the findings are not sustained by convincing proof and to a reasonable certainty. Merely repeating conflicts in the evidence does not satisfy this burden. [Citations.]” (*McKnight v. State Bar, supra*, 53 Cal.3d at p.1032.) Finally, we are mindful that all reasonable inferences must be resolved in Bolanos’s favor. (*Kapelus v. State Bar* (1987) 44 Cal.3d 179, 200.)

Applying these legal principles and considering the factual findings the hearing judge made, OCTC has not met its burden of proving moral turpitude (misappropriation) by clear and convincing evidence. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 [clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command unhesitating assent of every reasonable mind].) While Bolanos knew McCarthy would dispute his fee claim, it is *uncontested* he was ignorant of the rule that he must maintain the disputed funds in his CTA. Therefore, the withdrawal by itself does not show Bolanos acted dishonestly, although his actions were clearly negligent. In addition, he testified, and his December 26th letter corroborates, that he subsequently came to believe the \$250,000 agreement was invalid for lack of consideration. This belief may have been unreasonable, but the hearing judge found it was honestly held. Moreover, OCTC stipulated the funds were in fact *disputed* — foreclosing any argument that they were indisputably McCarthy’s. Finally, during the dispute and before the State Bar became involved, Bolanos explained his position to McCarthy, stayed in contact with her and her attorney, and offered to settle for \$70,000. These actions are consistent with the hearing judge’s view that this case was a bitter fee dispute — not an intentional misappropriation. We decline to disturb the hearing judge’s finding.

Contrary to our colleague's dissent, we have not "fashioned a defense to the moral turpitude charge" that would permit attorneys to unilaterally take their fees based on a belief in their entitlement to them. Rather, we have deferred to the hearing judge's credibility determination, as we *must* under our rules and Supreme Court precedent, that Bolanos acted without moral turpitude when he held disputed fees outside of his CTA during the brief pendency of the dispute, given his ignorance of the governing rule and his honest belief that the fee modification was unenforceable.

As set forth in her detailed decision, the hearing judge found Bolanos's conduct to be an example of aggravated mishandling of disputed fees based on a totality of the facts. The record supports viewing the misconduct as the hearing judge saw it, and relevant case law supports the judge's finding.¹³

The dissent, however, sees it differently. Our colleague has declared that the hearing judge's finding that Bolanos acted in good faith is irrelevant or, as she states, "simply beside the point." Instead, the dissenting judge attributes a dishonest motive to Bolanos, ignoring the hearing judge's credibility finding. But this finding is, by law, entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A) [great weight given to hearing judge's factual findings]; *McKnight v. State Bar*, *supra*, 53 Cal.3d at p. 1032 [hearing judge best suited to resolve credibility questions "because [she] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand"].) We are limited on review to the examination of a cold record

¹³ An honest but mistaken belief may provide a defense to a moral turpitude charge in cases involving attorneys who know the funds are in dispute. In *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, an attorney and former client were in a fee dispute when entrusted funds held by the attorney were awarded to the former client's ex-husband pursuant to a settlement agreement. The agreement provided that the husband would pay the wife a sizeable sum. The attorney viewed the agreement as a ploy to frustrate his ability to collect fees and relied on this belief to justify paying himself from the funds held in trust. Relying on *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 321-332, we found the attorney unreasonably withdrew fees, but was not culpable of moral turpitude because he honestly believed he was justified.

and must rely on the hearing judge's assessment of Bolanos's demeanor and the nature and quality of his testimony. The hearing judge was in an appreciably better position than we are to attribute intent or motive to Bolanos and the record is devoid of sufficient evidence to depart from the judge's well-reasoned conclusion. Accordingly, there is no basis to overturn the hearing judge's finding that Bolanos acted on a good faith but unreasonable belief of entitlement to the settlement funds and, thus, without a dishonest intent or moral turpitude. (*McKnight v. State Bar*, *supra*, 53 Cal.3d at p. 1032; *In the Matter of Respondent H*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 241.)¹⁴

Nevertheless, we recognize that Bolanos's ignorance of the rules for safekeeping client funds was wholly unreasonable. (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 840 ["attorneys assume a personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds [citations]"].) Even without specific knowledge of the rules, Bolanos should have fulfilled his *fundamental* responsibilities as McCarthy's fiduciary by maintaining the disputed amount in trust.

Like the hearing judge, we find that Bolanos's honest mistake, albeit unreasonable, does not constitute moral turpitude by intentional misappropriation. (See *Sternlieb v. State Bar*, *supra*, 52 Cal.3d 317; *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 589 ["honest belief, even if mistaken and unreasonable, [of] right to entrusted funds may be asserted as a defense to a charge of misappropriation involving moral turpitude or dishonesty"]; *In the Matter of Respondent K*, *supra*, 2 Cal. State Bar Ct. Rptr. 335 [attorney who knew client

¹⁴ Further, we find that the dissent's reliance on *Grossman v. State Bar* (1983) 34 Cal.3d 73 is misplaced. In *Grossman*, the Supreme Court affirmed a State Bar Court finding that in withholding a fee in excess of that set forth in a retainer agreement, an attorney had, under the circumstances of that case, committed misappropriation involving moral turpitude. We note that the attorney in *Grossman* made this argument for the first time on petition for review. Also, the record contained "no testimony by petitioner or any other witness that the fee overcharge" was a mistake, and the record otherwise belied the assertion. (*Id.* at p. 78.)

objected to his taking fee from settlement committed rule violation but not moral turpitude].) However, we find that his unilateral taking of those funds under the circumstances presented here amounts to negligent misappropriation.

Count 5: No Failure to Promptly Pay Funds Owed to McCarthy

OCTC does not challenge the dismissal of the charge that Bolanos failed to promptly pay the \$61,775.50 he owed McCarthy, in violation of rule 4-100(B)(4).¹⁵ We affirm the dismissal because Bolanos promptly paid McCarthy \$188,224.50, the amount he believed she was owed, and was not obligated to pay her the remainder until the dispute was resolved. Guided by new standard 2.1(c), as discussed *post*, the mishandling of client funds here amounts to negligent misappropriation.

Count 6: Failure to Promptly Release Client File

We affirm the hearing judge's finding that, in violation of rule 3-700(D)(1),¹⁶ Bolanos failed to promptly release McCarthy's file upon his termination.

IV. SERIOUS AGGRAVATION AND COMPELLING MITIGATION¹⁷

A. Aggravation

The hearing judge found two factors in aggravation. First, as Bolanos concedes, he committed multiple acts of misconduct. (Std. 1.5(b).) Second, the hearing judge found the misconduct was "surrounded by bad faith, dishonesty, concealment, and overreaching,"

¹⁵ Rule 4-100(B)(4) provides an attorney must "[p]romptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive."

¹⁶ Rule 3-700(D)(1) requires an attorney, upon termination of employment, to promptly release, at the client's request, all client papers and property.

¹⁷ Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Bolanos to meet the same burden to prove mitigation.

warranting serious aggravation. (Std. 1.5(d).) Bolanos contests this finding and correctly observes that honestly asserting a fee claim is not bad faith.

At the same time, we find he engaged in serious overreaching. He agreed to a fee modification and then attempted to renege on that agreement. He also provided an incomplete accounting to McCarthy. Though he thought he had a legitimate claim to \$37,000 as fees in light of the original fee agreement, he should have clearly accounted for that amount in his letter.¹⁸ Finally, he improperly conditioned delivery of McCarthy's file on her placing money in escrow to defray copying expenses. We assign these acts of overreaching significant weight in aggravation. In light of these findings, we disagree with the dissent that we have given only "summary" recognition to the aggravation in this case.

B. Mitigation

The hearing judge found four factors in mitigation, but we assign credit to only three.¹⁹ Even so, we agree with the dissenting judge that Bolanos's overall mitigation is compelling.

First, Bolanos is entitled to significant mitigation for stipulating to facts, including those establishing his culpability for the trust account violation, and conceding that culpability on review. Further, he fully cooperated in these proceedings and offered to pay McCarthy more than the amount of disputed funds before the State Bar became involved. (Std. 1.6(e) [mitigation for spontaneous cooperation to victims of misconduct or to State Bar].)

Second, Bolanos presented the testimony of 14 strong character witnesses. They included: Schmitt, the co-plaintiff in the Reynolds lawsuit; a law clerk who worked for Bolanos

¹⁸ We do not find Bolanos was attempting to hide the amount he had received from Reynolds given that McCarthy knew the settlement was for \$337,000.

¹⁹ The hearing judge gave "nominal" mitigating weight to good faith. We disagree and find that Bolanos's ignorance of the rules was unreasonable from the outset and precludes a finding of *any* good faith mitigation. (Std. 1.6(b) [mitigation for "good faith belief that is honestly held and reasonable"]; *In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966, 976.)

on the Reynolds case; a law student and mentee of Bolanos; a San Francisco superior court judge (related by marriage); former clients; and several attorneys. We particularly note that a special master in a matter handled by Bolanos's former law firm declared that Bolanos disclosed important information that otherwise would not have come to light. The disclosure demonstrated his "courage and integrity" because it threatened Bolanos's current and future employment. We find the quality and quantity of Bolanos's character evidence warrants significant mitigating weight, especially for the testimony of attorneys and a judge, who have a "strong interest in maintaining the honest administration of justice." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319; std. 1.6(f) [mitigation for extraordinary good character attested to by wide range of references in legal and general community who are aware of misconduct].)

Third, we assign significant credit to Bolanos's remorse and recognition of his wrongdoing. (Std. 1.6(g) [mitigation for prompt objective steps that demonstrate spontaneous remorse and recognition of wrongdoing and timely atonement].) At trial, he admitted he acted unethically and violated rules in the McCarthy matter. He also stated his intent to avoid repeating his past mistakes: "I want to take every step I can to make sure that I'm never in this position again, and that I always adhere to the letter of our ethical rules." Consistent with this sentiment, he conceded culpability on appeal and accepted a 90-day suspension and probation. He acknowledged that it would ensure that he "understands the seriousness of his actions and will take steps to avoid similar mistakes in the future." Importantly, he has retained his appellate counsel to provide ethics counseling to avoid future missteps.

V. A 90-DAY ACTUAL SUSPENSION IS APPROPRIATE DISCIPLINE²⁰

Our analysis begins with the standards, which promote consistent and uniform application of disciplinary measures. (*In re Silvertown* (2005) 36 Cal.4th 81, 91 [Supreme Court will not reject recommendation arising from standards unless grave doubts as to propriety of recommended discipline].) Both new standards 2.1(c) and 2.2(b) apply and provide that suspension or reproof is appropriate discipline for negligent misappropriation and for a rule 4-100 violation.²¹

With no case law to guide us in analyzing these new standards, we look to past cases addressing trust account violations and misappropriations not involving moral turpitude. The mishandling of disputed fees has typically resulted in a reproof rather than an actual suspension. (*Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, *In the Matter of Respondent K, supra*, 2 Cal. State Bar Ct. Rptr. 335; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716.) In misappropriation cases, the Supreme Court and this court have recommended a six-month suspension or less in similar cases involving grossly negligent misappropriation, even when the attorney committed other misconduct or serious aggravation has been found.²² While

²⁰ The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession, to preserve public confidence in the profession, and to maintain high professional standards for attorneys. (Std. 1.1.)

²¹ Standard 2.1(c) establishes the appropriate discipline for negligent misappropriation, and standard 2.2(b) for rule 4-100 violations other than misappropriation, commingling, and the failure to promptly pay out entrusted funds.

²² See, e.g., *Brockway v. State Bar* (1991) 53 Cal.3d 51 (three-month suspension for \$500 grossly negligent misappropriation and failure to return client funds, misconduct in second matter for acquiring adverse interest in client's property; mitigated by 13 years of discipline-free practice in California and five in Iowa, and favorable character evidence; aggravated by questionable candor and indifference); *Howard v. State Bar* (1990) 51 Cal.3d 215 (six-month suspension for \$2,500 willful misappropriation while under influence of chemical dependency; limited mitigation for three years' practice, restitution made under threat of discipline, alcoholism under control, and hearing held four years after misconduct).

Bolanos did not intentionally or by gross negligence misappropriate client funds, his unreasonable handling of disputed funds is a negligent misappropriation.

In sum, Bolanos acted unreasonably and overreached in handling the fee dispute. But as the hearing judge found, he did not act dishonestly and offered to pay McCarthy the disputed funds within two months. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38 [“An attorney who deliberately takes a client’s funds, intending to keep them permanently, and answers the client’s inquiries with lies and evasions, is deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception”].) Further, his misconduct is significantly mitigated by his good character evidence, cooperation with the State Bar, and remorse. He has also demonstrated insight by taking concrete steps to ensure his future conduct will conform to the rules of the profession. This evidence demonstrates, and our dissenting colleague agrees, Bolanos is not a risk for future misconduct. Further, we recommend a 90-day actual suspension, as did the hearing judge, which is far more significant than a reproof, the minimum discipline permitted by the standards and imposed in cases such as *Dudugjian, supra*, 52 Cal.3d 1092, and *Respondent K, supra*, 2 Cal. State Bar Ct. Rptr. 335. Considering all relevant factors, we affirm the hearing judge’s recommendation as being in accordance with the standards and the case law. We also recommend that Bolanos attend trust accounting school to ensure he properly handles client funds in the future.

To clarify, in no way do we condone Bolanos’s unreasonable ignorance of the rules or his poor judgment while embroiled in a fee dispute. It is of paramount importance in a fee dispute that an attorney strictly adhere to the rules and act in accordance with his or her client’s interests — not his or her own. Considering new standard 2.1, which signals us to carefully parse the level of intentionality in a misappropriation (dishonesty, grossly negligence, or something less), we have found that Bolanos in fact misappropriated his client’s funds through negligent

misconduct (std. 2.1(c)). We believe that our recommendation, based on both a fee dispute and a negligent misappropriation, will advance the goals of the discipline system, and impress on Bolanos the “high degree of care and fiduciary duty he owes to those he represents.” (*Stuart v. State Bar* (1985) 40 Cal.3d 838, 847.)

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Aldon Louis Bolanos be suspended from the practice of law for one year, that execution of that suspension be stayed, and that he be placed on probation for one year on the following conditions:

1. He must be suspended from the practice of law for the first 90 days of his probation.
2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.
3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.
4. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.
5. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.
6. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.
7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar’s Ethics School and of the

State Bar's Client Trust Accounting School and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics and Client Trust Accounting Schools. (Rules Proc. of State Bar, rule 3201.)

8. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We recommend that Bolanos be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order in this proceeding and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VIII. CALIFORNIA RULES OF COURT, RULE 9.20

We recommend that Bolanos be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension

IX. COSTS

We recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

PURCELL, P. J.

I CONCUR:

HONN, J.

I respectfully dissent.

The majority's description of this case as a mere "fee dispute" mischaracterizes the nature and extent of the misconduct. This is not a case where the attorney honestly believed that the client had given him *permission* to retain the disputed fees, as was the case in *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, 1099. Indeed, Bolanos testified that he "*knew* [McCarthy] would disagree with me, and I took the funds out of the trust account anyway." Nevertheless, the majority feels compelled to give great deference to the hearing judge's finding that Bolanos held an honest albeit unreasonable belief that "he was *entitled* to the funds given his hard work."

To be clear, I do not take issue with the hearing judge's finding. It simply is beside the point. In *Most v. State Bar* (1967) 67 Cal.2d 589, 597, the Supreme Court held that the attorney was culpable of serious misconduct, even though they accepted "his dubious assertion that he withdrew . . . the settlement funds in payment of what he considered to be a proper fee. While petitioner may have been justified in concluding that he should have been paid more than [the amount] agreed to by [the client], an attorney may not unilaterally determine his own fee and withdraw funds held in trust for his client in order to satisfy it, without the knowledge or consent of the client." This is precisely what occurred in this case.

To permit attorneys to unilaterally appropriate fees, which they know are disputed, merely because of an honest belief in their *entitlement* to the funds, whether due to their hard work or their interpretation of a fee agreement, sets a dangerous precedent and is unsupported in the law. In *Grossman v. State Bar* (1983) 34 Cal.3d 73, the Supreme Court found that the attorney's conduct in unilaterally setting his fee constituted a misappropriation of the difference between the amount taken by the attorney and the agreed-upon fee. The attorney in *Grossman* negotiated a settlement for his client and then decided he was entitled to a larger sum than that authorized by the retainer agreement. The Court was unimpressed with the attorney's

justification for charging the higher fee merely because it was consistent with his “normal practice.” (*Id.* at p. 78.) The Court viewed the attorney’s explanation as no more than “a *deliberate*, unilateral determination that such a fee was fair payment for [the attorney’s] services.” (*Ibid.*, italics added.)

The Supreme Court also rejected the attorney’s assertion that he was acting on an “honest misunderstanding” or a “mistake” about the terms of his retainer agreement because the record belied such an assertion. (*Ibid.*) As with the instant case, the attorney in *Grossman* did not immediately report receipt of the funds to his client and he signed her name to the settlement check without her authorization. He also waited several months to send her an accounting.

So, too, the record in the instant matter belies Bolanos’s assertion that at the time he took the settlement funds from his CTA, he held an honest good faith belief that his agreement to reduce his fee was unenforceable. By his own admission, he took the additional fee: (1) *before* he advised McCarthy he was renegeing on their agreement; (2) without telling her he had removed the funds; (3) without telling her he had co-signed her name to the settlement check; and (4) without even telling her he had *received* the funds. I thus find his after-the-fact assertion that he took the fees in reliance on the advice of an unnamed attorney, who told him that his agreement to reduce his fees was unenforceable, is pretextual at best.

In view of his certain knowledge that McCarthy did not agree to the higher fee or to his removal of the funds from his CTA, I conclude that Bolanos intentionally misappropriated \$61,775 from his CTA for his own purposes, thereby violating section 6106.

Furthermore, I take issue with the majority’s summary recognition of Bolanos’s additional acts of dishonesty and overreaching. Under standard 1.5(d), the nature and extent of this aggravation is very serious and is reason enough to impose discipline far more significant than 90 days, to wit: (1) Bolanos’s misrepresentation of the amount of the judgment and the

amount of the fees owing under his fee agreement in his accounting to McCarthy; (2) his failure to return the funds to his CTA after McCarthy disputed them;²³ (3) Bolanos's threats of a lawsuit if McCarthy did not pay him additional fees in quantum meruit; (4) Bolanos's additional threatening and intimidating communications with McCarthy, which were lacking in professionalism and amounted to overreaching; and (5) holding McCarthy's files hostage until she paid him for copying costs.

Based on the finding that Bolanos's misappropriation was intentional, standard 2.1(a) and relevant decisional law provide guidance as to the appropriate discipline. Standard 2.1(a) provides that disbarment is appropriate "unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case actual suspension of one year is appropriate."

Here, the amount misappropriated is significant — \$61,775 — but it only occurred once with one client. Also, there are compelling mitigating circumstances that suggest that disbarment is not warranted. In particular, Bolanos's sincere recognition of his wrongdoing and his remorse are strong indicia that his misconduct is unlikely to recur. Furthermore, the testimony of his 14 character witnesses provided clear and convincing evidence that his misconduct is aberrational. Under such circumstances, a one-year suspension, as provided by standard 2.1(a), should adequately protect the public, the courts, and the profession.

The decisional law also supports a one-year suspension, given the nature and quality of the mitigation evidence. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025 [attorney failed to notify client of receipt of \$17,000 and without authorization took \$ 8,665 as attorney fees and withdrew

²³ The majority wrongly gives mitigative weight to Bolanos's offer to settle the dispute for \$70,000 in March 2012. That offer came nearly three months after he had misappropriated the funds and then only after McCarthy had hired a malpractice attorney to vindicate her claims against Bolanos. In fact, McCarthy ultimately sued Bolanos in superior court for fraud and malpractice and McCarthy was made whole when they settled that case.

remaining \$ 8,500 as improper business loan, aggravated by lack of remorse or understanding of misconduct but with “sufficiently compelling mitigation” to warrant one-year suspension, including no prior record in 10 years, “isolated and aberrational” misconduct, good character references, and undiagnosed mental illness, all justifying one-year suspension under former std. 2.2(a)]; compare *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576 [attorney engaged in protracted acts of concealment and duplicity to cover up receipt of \$79,875 settlement on behalf of corporate client and intentional misappropriation \$29,875 as unauthorized attorney fee, aggravated by overreaching, indifference, and conflicts of interest, but mitigated by strength of good character.] Accordingly, I dissent from the majority’s recommendation of a 90-day suspension, and believe more significant discipline is warranted due to Bolanos’s intentional misappropriation.

EPSTEIN, J.

EMAIL FROM RON KELLY (6/21/16)

Ms. Barbara Gaal
Chief Deputy Counsel
California Law Revision Commission

Re: Study K-402 — Possible Questions for the State Bar

Dear Ms. Gaal,

You asked that I keep you informed of the State Bar's response to my May 19, 2016 request for information on how many complaints they have received in the past five years involving allegations of lawyer misconduct in mediation.

Attached is the State Bar's latest response to that request.

It states that it would not be feasible to perform a keyword search of their Notices of Disciplinary Charges, or of their stipulations of facts and discipline. It states that even if it were feasible, this would not result in reliable data for the reasons stated, and therefore the request is denied. The letter does offer to make available for inspection the approximately three thousand Notices and one thousand stipulations for the period 2012-2015.

The Commission's July 22, 2016 Agenda indicates that you are preparing for that meeting a memo entitled "Possible Questions for the State Bar". Two relevant questions would apparently be:

1. What State Bar complaint records, if any, do exist in a form that can feasibly be searched for the keyword "mediation"?
2. If any such records do exist, what would it take for the State Bar to be willing to perform this search and use the results to identify any cases in which the word "mediation" appears and which did then proceed to a stage where a Notice of Disciplinary Charges or a stipulation of facts and discipline was created?

Respectfully submitted,

Ron Kelly
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